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The Ninth Circuit, in an area of much confusion in the law erroneously denied Petitioners Schaef and McCarthy the Right to assert the defense of entrapment on the ground that they were foreclosed from asserting that defense because neither totally confessed to criminal conduct, although almost all of the Government's evidence was conceded and the circuits are in conflict as to the validity of barring an entrapment defense where there is no outright concession of criminal Involvement 60

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. _____

ERNEST A. SCHAEF,
JOHN KEMP McCARTHY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners, ERNEST A. SCHAEF and JOHN KEMP McCARTHY, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District Court for

the Central District of California, sentencing Petitioner Schaef to 15 years imprisonment on Count 1 and 5 years imprisonment on Count 6 to run consecutivel for a total of 20 years, and Petitioner McCarthy to 10 years on Count 1 and 5 years on Count 2 to run concurrently

OPINION BELOW

Trial in the Federal District Court was by jury.

The opinion of the Court below is appended as Appendix "A", and is also found in the Clerk's Record of the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is November 27, 1973.

The Petition for Rehearing was denied by the Court on January 14, 1974.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

CAN THE JUDGMENTS BE UPHELD WHEN THE EVIDENCE CLEARLY SHOWS THAT PETITIONERS SCHAEF AND McCARTHY WERE ENTRAPPED AS A MATTER OF LAW?

II

CAN THE JUDGMENTS BE UPHELD IN VIEW OF THE REFUSAL OF THE COURT TO EVEN INSTRUCT THE JURY ON THE DEFENSE OF ENTRAPMENT - THE ENTIRE DEFENSE OF PETITIONERS - AND THE COURT'S RULING THAT COUNSEL WERE FORBIDDEN TO EVEN ARGUE THE ISSUE?

III

SHOULD THIS COURT, WHICH HAS NEVER BEFORE REVIEWED THIS MOST SIGNIFICANT QUESTION COUNTENANCE THE INCONSISTENT RESULTS REACHED BY THE VARIOUS CIRCUITS ON THE RIGHT OF AN ACCUSED TO PROFFER THE DEFENSE OF ENTRAPMENT ALTHOUGH HE DISAGREES WITH PORTIONS OF THE GOVERNMENT'S EVIDENCE?

IV

CAN THE JUDGMENT AS TO PETITIONER McCARTHY STAND ABSENT ANY EVIDENCE SUFFICIENT TO CONVICT BECAUSE OF GUILT BY ASSOCIATION?

V

CAN THE GRAND JURY AND PETIT JURY WHICH SYSTEMATICALLY EXCLUDED PERSONS FROM AGES 18 TO 21 FROM THEIR COMPOSITION AND WERE TIMELY CHALLENGED ON THAT GROUND PRIOR TO TRIAL VALIDLY INDICT AND CONVICT PETITIONERS?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved is the Fifth Amendment to the United States Constitution and 21 U.S.C. 846, 841(a)(1), 18 U.S.C. §2.

STATEMENT OF THE CASE

On August 25, 1971, Petitioners, Ernest A. Schaef and John Kemp McCarthy together with Hardy Lee Fernimen were charged, by Federal Indictment with various counts of violating 21 U.S.C. § 846 (Conspiracy to distribute a controlled substance);21 U.S.C. §841 (a)(1) (Unlawful possession and distribution of a controlled substance), a violation of 18 U.S.C. §2 (Aiding and abetting).

On September 23rd, 1971, the defendants and Petitioners were arraigned on all counts applicable to them and entered pleas of guilty. At that time, there was also a designation of counsel, attorneys Rentzer and Segal.

On October 8, 1971, defendant Hardy Lee Fernimen filed motions for: a Bill of Particulars, Reduction of Bail, Striking

Surplusage from the Indictment, Suppression of Evidence, Severance and Separate Trial, Inspection of Grand Jury Minutes or In Camera Inspection, a copy of Grand Jury Proceedings, Discovery, and Dismissal of Indictment.

On November 2, 1971, Fernimen's motion for dismissal, severance, inspection, a copy of Grand Jury proceedings, and striking surplusage, were denied. A motion for a Bill of Particulars was submitted. The motion to suppress was continued until the date of trial and the ruling was reserved on the motion for discovery.

On November 23, 1971, defendant asked for continuance of the trial date to January 13, 1972. On January 13, 1972, defendant moved for a substitution of counsel with Attorney Luke McKissack to replace Rentzer. The motion was granted and a continuance of the trial date was granted

to January 27, 1972. Also on January 13, a motion by Fernimen to update discovery, quash the indictment and to reconstitute the Petit Venire and quash the indictment because of an unconstitutionally selected Grand Jury which issued it were filed.

On January 27, 1972, trial began in the court of the Honorable LAWRENCE T. LYDICK, Federal District Judge. The jury was impaneled and two alternates were sworn in. Count eight was dismissed on motion of the Government.

On February 1, 1972, the Government rested its case in chief. On the 9th of February, the defense rested. On February 11, the Court began instructing the jury and completed those instructions on the 14th of February. On the 14th, the Court also denied motions of defendants for Judgments of Acquittal and for a mistrial. The jury returned a finding of guilty as to all

counts against the defendants on the 15th of February, 1972.

Hardy Lee Fernimen was sentenced to twenty-five years imprisonment, receiving consecutive sentences of fifteen years on Count 1, 5 years on Count 3 and 5 years on Count 5, for a total of 25 years. Petitioner Schaef was sentenced to 15 years on Count 1, 5 years on Count 6 to run consecutively for a total of 20 years. Petitioner McCarthy was sentenced to 10 years in on Count 1 and 5 years on Count 2 to run concurrently. The judgments were filed on March 21, 1972.

Notice of appeal was filed May 12, 1972, and motion was made for appeal in forma pauperis which was granted.

On November 27, 1973, the Ninth Circuit Court of Appeals affirmed the judgment on Petitioner Schaef as to Counts Five and Six, and Petitioner McCarthy as to Counts one and

two.

A Petition for Rehearing was timely filed and denied by that Court on January 14, 1974.

STATEMENT OF FACTS

The Government called as its first witness, Robert W. Sternaman, employed as a special agent by the United States Bureau of Narcotics and Dangerous Drugs, (BNDD), currently assigned to the Manila, Phillipines District Office. (R.T. 82). Sternaman testified as follows:

On July 10, 1971, while employed by the BNDD and working out of the Los Angeles Regional Office, Ternaman went to the Hollywood-LaBrea Motel in the company of a paid Governmental informant, Jimmy Johnson. (R.T. 82-83, 267). Jimmy Johnson had told Sternaman and other agents that Petitioner Schaef and Petitioner McCarthy were there and that Johnson had made arrangements to introduce an agent to them in order to purchase a quantity of cocaine. (R.T. 83). After searching Johnson,

Sternaman and Johnson proceeded to and arrived at the Hollywood-LaBrea Motel at approximately 10:30 P.M. (R.T. 83, 274). They proceeded to Room 115 of the motel, knocked on the door, and were admitted by the Petitioner McCarthy. (R.T. 83, 274).

Johnson then introduced Petitioner McCarthy to Sternaman and they negotiated the sale of three ounces of Bolivian cocaine, two ounces of one quality for $700 per ounce and one ounce of another quality at $400. (R.T. 84-85). And that the cocaine was of suitable quality for cutting. (R.T. 85) McCarthy then stated he would have to call ERnie, (identified as Ernest Schaef by Sternaman), and place the order. He then went to a public pay phone to make the call. (R.T. 85,274) After that call, McCarthy received a call in the room and made a subsequent call on the public pay phone on returning. McCarthy said

they were to meet Ernie at the Chalet Gourmet at Sunset and Fairfax. (R.T. 86).

Upon arrival at the Chalet Gourmet, five minutes later, the Petitioner Schaef was not immediately in sight, but soon after appeared from inside an apartment house. Agent Sternaman then approached him and asked if he was looking for the informant, Jimmy, who was in a phone booth. (R.T. 87, 276). Schaef then stated that they were all to return to the motel to test the cocaine. After some difficulties there, it was decided to go elsewhere to test and exchange the cocaine. (R.T. 88-89). The exchange finally took place at curbside on Formosa Avenue in the Hollywood Area. (R.T. 90).

Sternaman then testified that the informant Johnson was again searched and nothing was found. (R.T. 91) Sternaman identified Plaintiff's exhibits one and two as the cocaine involved in that sale and defense

attorneys stipulated to the findings of an expert chemist in that exhibit one and two did contain cocaine. (R.T. 91-93).

Sternaman further testified that on July 20, 1971, he received a call from Johnson, who put Schaef on the phone, and that he and Schaef negotiated for another sale, this time eight ounces at $650 an ounce. (R.T. 94-95). The next morning in another phone conversation, Schaef and Sternaman agreed to meet at 10:00 A.M. at the Sun Ray Lodge Motel where they ultimately met at approximately 12:30, 1:30 P.M. (R.T. 95-96,277). Sternaman went to room 20 in that motel and met Johnson and Schaef there. After some conversation about future purchases of China white heroin, Sternaman paid for and received ten ounces of cocaine, packaged in disposable baby bottles for $6,500. (R.T. 96-97).

On the 27th of July, Sternaman received

two more phone calls from Schaef about potential heroin deals and on the 28th they met at Edward's Steak House, where they discussed Sternaman's contacts in Detroit and the inferior quality of the cocaine Schaef had supplied him. At this time Schaef agreed that a refund could be arranged. (R.T. 101-103). Negotiations were then carried on for five more kilograms, a one gram sample of which was given to Sternaman on the 29th of July (R.T. 104-109).

Schaef again called Agent Sternaman and explained that the five kilograms were not immediately available, (R.T. 110) but that his Mexican connection was working on it; that this was the largest order they have ever had and that his connection was reliable. (R.T. 111) Schaef called on the 6th of August and informed Sternaman that the five kilos were still not available, but 42 ounces were available (R.T. 112-119). Schaef found that the 42 ounces were unavailable but

there were 35 ounces that came the evening of August the 8th. Sternaman then agreed to call Schaef the following day at 787-7488, to make arrangements for the delivery. (R.T. 119-121) Counsel for the defense stipulated to the fact that that number was an unlisted number in the name of Hardy Lee Fernimen and located in Van Nuys. (R.T. 121-122).

Sternaman testified that on the 9th of August, he made three phone calls to the Fernimen number and each time he called, Fernimen answered the phone and then Schaef would come to the phone. (R.T. 122-123). During the third conversation, Schaef and Sternaman agreed to meet in the parking lot of Norm's to make the transaction. (R.T. 123) When Schaef arrived at Norm's, he got into Agent Sternaman's car, Sternaman asked if he had the cocaine, Schaef replied it was in the trunk of his car and got out to

get it. (R.T. 208) Schaef got back into Sternaman's car with a yellow zippered suitcase from which he removed two plastic wrapped containers. (R.T. 209) At that point Sternaman got out of his car to get the money, but instead gave a signal to other agents to have Schaef arrested and he was arrested. (R.T. 209).

Defense counsel stipulated to the contents of the two packages as being cocaine and that custody of the samples was maintained by Sternaman until sent to the BNDD chemist in San Francisco. (R.T. 210-212). These were received as Government's Exhibits 6 and 6A with the suitcase as 6B (R.T. 212-213).

At that point Sternaman, accompanied by other agents, went to the Fernimen address, 7961 Mammoth Avenue, Van Nuys, and while enroute was informed that a signed search warrant was being brought to that address by

another agent. (R.T. 213-214). Upon arrival Sternaman knocked on a screen door, announcing that they were Federal Agents with a search warrant. (R.T. 214). Two small children appeared at a window and Sternaman told them to have their mother or father open the door, they waited half a minute when another agent let them in. (R.T. 214,264). This agent was one of the other agents that had been stationed at doors to the house. Agent Sternaman was not the first agent in the house. (R.T. 264) Upon entering, Sternaman found everyone already in control, Fernimen was sitting on a sofa in the rear of the house by a telephone. (R.T. 214).

At that point, the search warrant arrived and was handed to Fernimen who appeared to read it. (R. T. 214). The subsequent search of the house produced a single beam postage scale, Exhibit 7B, a

quantity of disposable baby bottles, Exhibit 7C, a large plastic bag containing 1,221 grams of ephedrine sulfate, Exhibit 7A, and two smaller bags of ephedrine sulfate, Exhibit 10, all found on a closet shelf in the master bedroom. (R.T. 214-221, 455).

Later that day, the jailer at the Los Angeles Central Jail brought to the attention of Sternaman that Defendant Fernimen had Nine One Hundred Dollar bills in his possession and upon checking the serial numbers, Sternaman determined that one of the bills, (Serial #L14026766A), had been used to purchase Exhibit 3, 277.8 grams cocaine. (R.T. 221-223) The serial number was authenticated by a list of bills used by Sternaman and recorded by other agents. (R.T. 223, 280-281).

On cross-examination of Agent Sternaman, it was adduced that Sternaman had no knowledge of any fingerprints of Hardy Lee

Fernimen on any of the cocaine packages admitted as exhibits by the plaintiff; (R.T. 246) also that no time did he personally test the contents of the cocaine packages by taste, small, snorting or any other method; (R.T. 246-248) also that throughout the netotiations with defendants and petitioners he posed as a head of a narcotic organizatio based in Detroit. (R.T. 248-249, 253).

Further, on cross-examination, Sternaman testified that there was a swimming pool in back of the house and that when Mrs. Fernimen was arrested, she was wearing a swimming suit that may have been wet. (R.T. 264-265, 342) Sternaman also stated that h thought it questionable that his announcement at the door could have been heard from the pool area. (R.T. 264-266, 342). Further Sternaman admitted that the package of cocaine found in the Fernimen refrigerator did not bear the fingerprints of Hardy Lee

Fernimen. (R.T. 267).

On direct testimony, Agent William F. Alden, of the BNDD testified that after the July 21st transaction, he and other agents followed Petitioner Schaef to Fernimen's ~~Mammoth Avenue address~~, (R.T. 279, 318) and that they saw Schaef enter the house and leave ten minutes later. (R.T. 279).

Agent Gilbert Mora testified that he was present at the arrest of Fernimen and that subsequent to that arrest, he took the palm prints of Fernimen. (R. T. 297-298). Fingerprint experts Bill Walmsley and Edward T. Hocking testified that the right palm print of Hardy Fernimen taken by Mora, matched a palm print taken off "bag I-1" part of Exhibit 6. (R.T. 302-310, 368, 377, 382).

Mora and other agents testified that they followed Schaef to the Fernimen address on July 21st, (R.T. 318) and on August 9th

Mora observed Schaef exit the Fernimen residence carrying a yellow suitcase. (R.T. 321).

Agent George Clemente testified that on August 9th, he took part in the arrest of the Fernimens and that his superior, Agent Alden, stationed him at a side door; (R.T. 339) that he heard Agent Sternaman or Agent Alden say, "Federal Agents, I have a warrant" then he heard a splash in the swimming pool and seconds after that he entered the house behind Agent Sutton. (R. T. 339. And that when he entered the house, he saw Defendant Fernimen on the phone and then Agent Sutton addressed Fernimen stating they were Federal Agents. "We have a warrant". (R.T. 340). Clemente also testified that he and Sutton told Fernimen to sit down and about a minute later Agent Sternaman entered the area where they were standing. (R.T. 340). Agent Douglas Keuhl testified that he took part in the arrest of the Fernimens and that he

conducted a search of the refrigerator at the Fernimen address, and found twelve packets of cocaine in the crisper. (R.T. 344-345).

Albert Lesinsky testified that he was involved in the business of selling used furniture in Mexico and that his Mexican truck driver also delivered narcotics into the United States. (R.T. 395-398) Also that this driver brought nine ounces of cocaine with him on one occasion and that he (Lesinsky) sold that cocaine to a man who introduced himself as "Tony", who Lesinsky later knew to be Fernimen. (R.T. 398-402) and that Defendant Fernimen had made other requests for quantities of cocaine, but that he did not want to deal anymore with Fernimen because he feared he was a policeman. (R.T. 405-407).

On cross-examination, Lesinsky testified that the Petitioner McCarthy originally asked

him if he could get some pills and cocaine. (R.T. 418-419) That at that time he did not know of anyone who dealt in narcotics, but that he would make inquiries. (R.T. 418-419).

Also on cross-examination, he stated that the cocaine had been delivered to him at his home by his Mexican driver, who waited at Lesinsky's home until after the deal with Fernimen went down and to whom Lesinsky paid the entire amount paid to him by Fernimen. (R.T. 420, 423, 424, 440, 445) He further testified that he had agreed to testify for the Government after he had been arrested for possession of 54 kilos of marijuana. (R.T. 412).

The defense began presentation of its case with the testimony of Nicolas B. Ricchiuti who testified that he had lived across the street from the Fernimens for seven years and that when the Fernimens went

on vacation, he was often left with access to the house so that he could care for the Fernimen's dogs and that there were keys left out for that purpose. (R.T. 476-479).

John R. Howard testified that he had, while operating as a licensed private investigator, opportunity to work with Hardy Fernimen on cases for the Los Angeles Police Department and that Fernimen had mentioned to him, in June or July of 1971, that he was working on an investigation into narcotics in the Detroit area. (R. T. 488-490).

Charles Wilson testified that in July or August of 1971, he was Fernimen's partner in the Organized Crime, Intelligence Division of the LAPD and that during that period he recalled two letters written by Fernimen to investigators in another jurisdiction. (R.T. 492-495) Further, that typically in working in the intelligence area of police work an officer would work with informants with whom only that particular officer would have

contact, (R.T. 496-497, 544, 562,602,607) and that immediately prior to his arrest Fernimen was working on a narcotics case. (R.T. 501) Sergeant Wilson also stated that he knew that Petitioner McCarthy was an informant of Hardy Fernimens. (R.T. 511, 579) He further testified that in the past, narcotic agencies would in some situations allow smugglers of narcotics, after their apprehension, to continue on their way in an effort to capture the person on the other end. (R.T. 511-512).

Several former associates of Hardy Fernimen testified to Fernimen's ability as an investigator and as an investigatory partner; (R.T. 549, 550, 563,573,578,582, 617, 632,635,638,659,687,690,692,697) Also that there is no set procedure for handling informers or for proceeding with an investigation, (R.T. 550,554,564,569) and that the handling of narcotics by officers was not

unusual; (R.T. 664) also, that some officers don't even reveal or report the names of their informants. (R.T. 569,602,756)

Ralph Thorson, a Private Investigator, testified that he lived at 10800 Otsego, North Hollywood, and that at one time he, Fernimen and Schaef worked together to lure a narcotics suspect into the United States out of Mexico by posing as real estate investors. (R.T. 622-624) He also knew McCarthy to be an informant. (R.T. 623-624).

The defense made an attempt to have introduced, a letter written by an investigator in Detroit which was in response to a letter written by Fernimen regarding a person in custody in Michigan who appeared to be helpful in narcotic investigations in which Fernimen was currently engaged. The letter was circumstantially corroborative of testimony that had been given by a prior witness in regard to the big narcotic dealings in

Detroit and corroborative to the testimony Fernimen was to give. (R.T. 672-674) Judge Lydick ruled the evidence irrelevant and objectionable on hearsay grounds. (R.T. 679).

Hardy Lee Fernimen testified, in his own defense, that he had worked as a police officer from 1962 until his arrest August 9, 1971. (R.T. 699) That during that time, he often worked undercover and with informants, (R.T. 701-703) that some of his informants are known to noone but himself, (R.T. 707, 727) also, that in working undercover, it would inevitably occur that the plainclothes car they were using would become so well known that they would use their own private vehicles in order to continue operations and would even change license plates; (R.T. 710-711) that often in working vice, the use of disguises and other ruses were necessary to catch violators; (R.T. 714-718, 728) also that in July, 1971, he (Fernimen)

corresponded with an intelligence agent in Detroit in regards to getting national narcotic traffic information from an inmate in a Detroit prison. (R.T. 762-763) But, that negotiations were not successful because of the character of the inmate. (R.T. 765-766) He stated further that Petitioner McCarthy had been an informant of his since 1968. (R.T. 768).

In further testimony, he stated that Al Lesinsky had never sold him any narcotics, nor did he give Lesinsky a gun, but, that he had had conversations with Lesinsky regarding drugs. (R.T.783-784, 787) He also stated the Tiny Naylors was regularly frequented by police, making it unsuitable for the clandestine narcotic operations, he was allegedly involved in at that location (R.T. 788). He also testified that he had previous financial dealings with Petitioner Schaef that ended with a loan that he had made to Schaef becoming a bad debt. (R.T. 792) But, that

Schaef did pay back $400 of that debt and that the one hundred dollar bill that was found on Fernimen when he was arrested had come from Schaef; (R.T. 793-794) also that Schaef, being a close friend would frequently come to Fernimen's house and spend the night. (R.T. 800).

Fernimen stated that he had received information from a supervisor that an associate of McCarthy's had been trafficking in cocaine. (R.T. 797) On receiving this information he had interviewed McCarthy and checked on the phone calls he had been making (R.T. 801) A few days later, Schaef was informed by Fernimen that McCarthy had told him of the interview and that he too had heard that an associate of McCarthy's had sold to an agent. (R.T. 802) Schaef also said to Fernimen that he had met an individual named, "B" who Fernimen later identified as Agent Sternaman. (R.T. 802). Schaef told

him that Sternaman had proposed to him that he take over Sternaman's Detroit drug business for a cut and in addition that Schaef would get $1,500 to take some narcotics back to Detroit for Sternaman. (R.T. 803) Fernimen had also told Schaef to get all the information he could about "Bob". (R.T. 802).

Schaef also had cut a quantity of cocaine while at Fernimen's house in preparation for the sale to Sternaman Fernimen at this point handled the packaged narcotics and had put the equipment for this operation in a bedroom because his wife and kids would be back soon. (R.T. 805-807) Fernimen testified that Schaef received several calls from Sternaman while at Fernimen's residence, (R.T. 808) and that Schaef stated that he would give Fernimen all the information he had on Sternaman after Schaef had met with him. (R.T. 810).

Fernimen stated that at the time of his arrest he had been in the pool area, when he went into the house to answer the phone and that seconds later, someone came in the side door and said "I'm a Federal Agent, and I have a search warrant for your house". (R.T. 811).

Manual Diaz testified that he was currently employed as a bailbondsman and private investigator, but had previously worked for the state as a narcotic officer and prior to that as an officer in the LAPD. (R.T. 734) He stated that in his experience he had heard that certain investigators had given narcotics to addicts in order to get information. (R.T. 737-738) Also that there could be circumstances when an officer would have narcotics in their house and that the narcotics would not be immediately booked. (R.T. 744-745).

Daniel Jones testified that sometime

four or five months prior to trial he paid money to Hardy Fernimen amounting to $800 in partial payment of a debt, and that the money was delivered to Fernimen by Lake Headley. (R.T. 758-760).

Defendant Schaef testified that he had never had any dealings in narcotics until he had talked to Jimmy Johnson, with whom Schaef had been discussing ways of making fast money. (R.T. 1050) Schaef stated that he would not have sold narcotics to Agent Sternaman if Johnson had not persuaded him to. (R.T. 1054) Schaef stated that he told Fernimen that he had been approached by a man that had large dealings in heroin and cocaine in Detroit, that he was worried about the case and asked if there was something that they could work out, some kind of a deal where he could get names or whatever was available, for help on his case. (R.T. 1086).

Petitioner John McCarthy testified that

he had been working with the Los Angeles Police as an informant since 1966 or 1967 and that he began working with Fernimen as an informant in 1968. (R.T. 1157).

The Government called Geroge Blanchard of the Detroit Police Department and he testified that he had been in communication with Hardy Fernimen regarding a Michigan prisoner, Ronald Young, and that in regards to that prisoner, had sent a communication to the LAPD in July of 1971. (R.T. 1238) Further, that in other communication with Officer Fernimen, he had told Fernimen that Ronald Young was a hit man for the narcotic trade and been involved in several murders and that no deal regarding Young should be made. (R.T. 1243).

REASONS FOR GRANTING THE WRIT AND AMPLIFYING THE SAME

I

PETITIONERS SCHAEF AND McCARTHY WERE ENTRAPPED AS A MATTER OF LAW.

The uncontested facts in this case show that sometime in early July, 1971, one Jimmy Johnson, an informer for the Secret Service, F.B.I. and Federal Bureau of Narcotics and Dangerous Drugs, told the BNDD that Petitioners Schaef and McCarthy were willing to sell cocaine. As a result of this information, various sales transactions were consummated with Agent Sternaman of the BNDD representing himself as a big buyer and seller in the Detroit Area who was willing to integrate Petitioner Schaef into the drug business. Ultimately, defendant Fernimen discovered that his friend since high school, Ernie Schaef, was in trouble - had sold narcotics to an un-

identified agent - and he (Fernimen) upon confronting Schaef, and learning of his contact with the self-identified "big dealer from Detroit", set in motion a daring attempt to have Schaef deliver cocaine at his behest and later effect an arrest or pass on information on the Los Angeles to Detroit drug traffic - with a view to obtaining a break for Ernie Schaef.

The issue here is one of entrapment. Ernie Schaef testified that he had never previously sold narcotics and did so only because of his own domestic crisis, plus Jimmy Johnson and subsequently Agent Sternaman's extravagant promises to pay him considerable money and put him in business. Agent Sternaman - who stepped into Jimmy Johnson's shoes - was not percipient to the original arrangements, inducements and circumstances surrounding the presentation by Jimmy Johnson. Petitioner Schaef testifie

in Court to his versions. For some strange reason, the prosecution never called Jimmy Johnson - although it was conceded that he was available - to contradict Schaef. The evidence in the record is therefore consistent with one hypothesis only and that is entrapment as a matter of law.

Any discussion of the law of entrapment must begin with an analysis of Sherman v. United States, 356 U.S. 369, 78 S. Ct. 819 (1958), the leading case on the subject. In that case, the defendant - formerly convicted of narcotics violations on two occasions - was convicted of three sales of heroin to a Government informer. The United States Supreme Court overturned the conviction, finding entrapment as a matter of law. In fact, in the instant case, unlike in Sherman, the informer was in the hire of the Bureau of Narcotics and Dangerous Drugs (BNDD) and two other Govermental agencies, the Secret Service and the F.B.I.

Lest it be contended that Jimmy Johnson, the paid informant here, went beyond bounds by entrapping Petitioners and that the Government should not be penalized by his overzealous representations, we quickly respond that the Sherman Court opined:

> "The Government cannot disown Kalchinian (the informant) and insist it is not responsible for his actions." (356 U.S. at 374, 78 S. Ct. at 821).

Lest it also be contended that since the informant set up cocaine transactions on more than one occasion, the entrapment doctrine is not sufficiently pervasive to exonerate the defendants as to each occurrence, Petitioners again hasten to evoke the language of the Sherman Court:

> "It makes no difference that the sales for which Petitioner was

convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was a product of the inducement." (356 U.S. at p. 374, 78 S. Ct. at p. 822).

Although the Government offered a witness - whose testimony must indeed be scoffed at and was certainly not relied upon by the jury - one Al Lesinsky, who testified that Petitioners purchased cocaine from him on an earlier occasion, his narrative was thoroughly inconsistent, wholly fabricated and unearthed only after he was arrested for a large narcotics transaction not involving these Petitioners. Manifestly, there is no jury finding, nor would there have been one, based upon the incredible testimony of Lesinsky. In fact, the Government, although calling him as a

witness in the Case in Chief never premised any criminal charges upon his expected testimony.

In the Sherman case, supra, the defendant had twice been convicted of sales of narcotics; however, the Court discounted the prior involvements and fastened on his propensities at the time the sales were committed which were the subject of the government's case. Cf., Hansford v. United States, (D.C. Cir. 1962), 303 F. 2d 219. In other words, a person need not have a drug free past to avail himself of the defense of entrapment as a matter of law. The Sherman Court concluded:

> "The case at bar illustrates an evil which the defense of entrapment is designed to overcome. The Government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also

into returning to the habit of use. Selecting the proper time, the informer then tells the Government agent. The set up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus, the Government plays on the weakness of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted. Law enforcement does not require methods such as this." 356 U.S. at 374, 78 S. Ct. at 819.

Of course, Petitioners had no criminal backgrounds and thus any evidence of an urge to coalesce with Government agents and informants in the transfer of cocaine is totally absent from the record. Neither Petitioner Schaef nor Petitioner Fernimen had ever been previously even charged with

a criminal offense. McCarthy's minor encounters with the law do not appear in the record and are of no importance.

Thus, the Government failed to sustain its burden of proof, once the defense of entrapment was proferred, of proving beyond a reasonable doubt that the crime did not originate in the mind of a Government agent or informant and that Petitioners were merely awaiting a propitious opportunity to peddle dope. See Notaro v. United States, infra; Devitt & Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §13.13.

Petitioners argue here --------- - as did the four concurring Justices in Sherman that this Court via the doctrine of entrapment has established a minimal level of decency, beneath which officers, and agents of officers, cannot go in enticing persons to commit crimes. If that performance is sufficiently substandard, it is immaterial

that the defendant may have been willing to become criminally involved. Mr. Justice Frankfurter, speaking for those Justices, traced the history of the entrapment doctrine to the feeling of outrage at the conduct of law enforcers. The Justice formulated the principle thusly:

> "The Courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced." 356 U.S. at 378, 78 S. Ct. at 824.

We invite the Court under the factual record in this case to adopt that position.

To sanction the conduct engaged herein is to permit Governmental convictions to be based upon hearsay recitations of a crucial

material-witness informant - whose statements are explicitly denied by the accused under oath and subject to cross-examination without ever calling those informant-agents identified and under the control of the Government. Such a conclusion is anathema to American jurisprudence and unpalatable to those who regard our Courts as instruments of justice. Cf., McNabb v. United States, 318 U.S. 332, 341, 63 S. Ct. 608, 613 (1943).

The function of law enforcement is prevention of crime and apprehension of criminals, and does not include the manufacturing of crime which amounts to entrapment. Although stealth and strategy are permissible weapons of police officials, they are objectionable when the criminal design originates with government officials, or their agents, and they implant intent in the mind of persons not previously dispos

to commit the offense and induce its com commission in order to prosecute. Sherman v. United States, 356 U.S. 369, 78 S. Ct. 819 (1958); see Cohen v. United States, (9th Cir. 1953) 201 F.2d 201 F.2d 386,cert. den. 73 S. Ct. 864, 345 U.S. 951; Malatkofski v. United States, (1st Cir. 1950), 179 F.2d 905; Nero v. United States, (6th Cir. 1951), 189 F.2d 515, cert. den., 72 S. Ct. 115, 342 U.S. 872, reh. den. 72 S. Ct. 232, 342 U.S. 899; Neill v. United States (8th Cir. 1955), 225 F.2d 174.

Entrapment occurs where it appears that agents of the Government or persons under their control incited, induced, instigated or lured persons into committed. United States v. Virciglio, (5th Cir. 1971), 441 F.2d 1295; Beatty v. United States,(5th Cir. 1967), 377 F. 2d 181, reversed 88 S. Ct. 234, 389 U.S. 45; Robison v. United States, (9th Cir. 1967), 379 F.2d 338, vacated 88

S. Ct. 903, 390 U.S. 198, or remand 307 Fed. Supp. 403. Where the idea of committing a crime originates with law enforcement officers or their agents, and a person has no previous intent to perpetrate such a crime, but is induced to do so, he is a victim of "entrapment" and in such a case the law, as a matter of policy, forbids his conviction. United States v. Teeslink, (9th Cir. 1970), 432 F.2d 775; Rowlette v. United States, (10th Cir. 1968), 392 F.2d 437; Eisenhardt v. United States, (5th Cir. 1969), 406 F.2d 449; United States v. Grimes (6th Cir. 1971), 438 F.2d 391; McDowell v. United States, (8th Cir. 1967), 383 F.2d 599 United States v. Gaines (6th Cir. 1965) 353 F.2d 276.

When the criminal design originates not with the accused, but in the mind of the Government or its agents, and the accused is lured by persuasion, deceitful representati

or inducement into the commission of the criminal act, then the Government is estopped by sound public policy from prosecuting the one who commits it. United States v. Lemons (7th Cir. 1952) 200 F.2d 396; United States v. Cerone (7th Cir. 1945), 150 F.2d 382, cert. den. Aloisio v. United States, 66 S. Ct. 97, 326 U..S. 756, and Cerone v. United States, 66 S. Ct. 98, 326 U. S. 756; United States v. Romano (2nd Dir. 1960) 278 F.2d 202.

Entrapment is the Judicially created doctrine geared to retarding the Government from fostering crime, rather than preventing it. As Mr. Justice Brandeis, who certainly belongs on any all-star team of Supreme Court Justices, expostulated long ago:

> "Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself;

it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." Olmstead v. United States, 277 U.S. 438 at 485, 48 S. Ct. 564 at 575.

If it be established that an act denounced as crininal was committed by a person whose conduct was the product of the creative activity of law enforcement officers of the United States and the frailties in Schaef's personal life (wife seeing a psychiatrist and children to support, etc.) which caused him to succumb to the overtures. As a paid Government informant, Jimmy Johnson is in legal contem-

plation a Government agent. Sherman v. United States, supra; Notaro v. United States (9th Cir. 1966) 363 F.2d 169, appeal after remand, 388 F.2d 680; Carson v. United States (9th Cir. 1962) 310 F.2d 558; United States v. Lavorick (3d Cir. 1965), 348 F.2d 708; United States v. Owens, 228 Fed. Supp. 300. It has even been said that informants who are paid to make cases are extremely suspect as more likely to entrap than ordinary informants. Maestos v. United States, (10th Cir. 1965), 341 F.2d 493. As such, the undisputed entrapment of Petitioner Schaef requires a reversal and dismissal of the cause.

Society could not possibly have benefited from having its agencies create a crime so that they could catcah a criminal. Presumably, crime should be eliminated as far as possible. And if the Police, Judges and lawyers, like myself, are forced to find

other jobs, then so be it. The advantages of peace and tranquility in the home and streets outweigh our right to prey on the misery or temptations of others. It seems strange to assert that murderers should be cultivated so that we can hire police to catch them, attorneys to prosecute and defend them, judges to sentence them, wardens to execute them and undertakers to bury them. Given the fact of murder, some of us become necessary. However, this is not an argument to encourage murder. And yet the present prosecution hinges upon permitting Federal agents to create a crime in order to prosecute it and imprison the defendants enticed to become involved in it.

Gentle pleadings, phony inducements, lucrative rewards are the stock artillery of Government agents, especially paid informants such as Jimmy Johnson - who after all are not paid for merely treading water,

or biding their time, but rather are remunerated for "making cases".

The last time the entrapment issue reached the United States Supreme Court, in the Sherman case, supra, four of the nine Justices of the nation's highest tribunal were of the opinion that the doctrine needed overhauling and should have a different emphasis. That quartet concluded that the doctrine is designed to deter sufficiently substandard and deceitful overtures by law enforcement representatives to engage in criminal conduct. The fact that a defendant was receptive to illicit suggestions should not leave the defense wanting. In other words, even if Schaef et al were ready, willing and able to commit the crimes in question - which they were not - is it society's gain to exploit this weakness and push them over the brink? Why should our society transform inchoate criminals into

actual ones?*

The Fifth Circuit Court of Appeals in United States v. Bueno (5th Cir. 1971), 447 F.2d 903 resolved the case wherein the Government voluntarily refrained from calling to testify its informant and relied upon the whim of the jury to simply reject the defendant's testimony out of hand. The Court concluded:

> "The question then comes as to whether the government can rest on the challenge to the credibility of the defendant, or whether it must come forward with some contradictory evidence. The evidence of willingness to make the sale, which is common to the usual entrapment defense, is no answer. In such cases

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* Certainly arrest or conviction statistics cannot be a salutary human goal. Should we organize and pay our police force to seek out alcoholics and furnish them with alcohol?

where the issue is willingness or unwillingness of the defendant, the defense becomes a jury question because the sale itself constitutes evidence of willingness contrary to the defense of unwillingness. The issue there is not what he did but why he did it, i.e., because of coercion. The government's case cannot rest on the mere fact that he entered into the Informer's plan willingly."

"Neither party produced the Informer. If the Informer's testimony would tend to disprove the Defendant's story, it was up to the government to produce him. The defendant having testified to facts which establish a defense as a matter of law, the government has the duty to come forward with contrary proof, if it is to carry its ultimate

burden of proving guilt beyond all reasonable doubt. United States v. Groessel, 440 F.2d 662 (5th Cir. 1971)." (Emphasis added).

Similarly here, the testimony of Petitioner Schaef without contradiction by the paid Government informant states a clear case of entrapment. No contradiction was forthcoming. Thus, the cause should be reversed.

It is true that this Court in United States v. Russell, 93 S. Ct. 1637 (1973), ___ U.S. ___, disapproved the sweeping conclusion of Bueno to the extent that it held that entrapment was assured from the mere fact that Government agents provided part of the essential material needed to commit a crime; but this case goes far beyond Russell in terms of both governmental instigation and the refusal of the Government to call their informant, who

was available to them, to discount Petitioner Schaef's uncontroverted testimony.

II

THE PAID GOVERNMENT INFORMANT, JIMMY JOHNSON, UNCONTROVERTIBLY ENTRAPPED THE PETITIONERS INTO COMMITTING CRIMINAL DEEDS FOR WHICH THEY WERE CONVICTED. HOWEVER, THE JURY WAS NEVER EVEN INSTRUCTED ON THE DEFENSE OF ENTRAPMENT AND COUNSEL WAS FORBIDDEN TO ARGUE IT. THUS, THE JUDGMENTS CANNOT STAND.

In view of the lengthy statement of facts contained in the preface to Argument I, no attempt here will be made to reprodu verbatim the testimony adduced therein. The germane evidentiary material will be capsuled and referred to in as pithy a fashion as possible.

In this case, it is indisputable that Jimmy Johnson - a paid Federal informant-agent for the Secret Service, F.B.I and th

BNDD (Bureau of Narcotics and Dangerous Drugs) lured Petitioner Ernest Schaef, with a hitherto unblemished record, into trafficking in cocaine. Schaef testified to the overtures and the rich rewards for dealing in cocaine, a non-addictive drug, and Schaef, because of immense family problems involving expensive psychiatric treatment for his wife and the support of his children, succumbed to the temptation. Numerous attempts to persuade Schaef to traffic in hard narcotics (Heroin) failed. Schaef was convinced to sell cocaine to Federal agents only after his weaknesses were dwelt upon and the amount of money appeared problem-solving and irresistible. Petitioner McCarthy's sole role was limited to introducing Schaef to the Federal informant and Agent Robert Sternaman. Appellant Fernimen merely attempted to set up the would-be buyers and help his friend of 17

or 18 years, Ernie Schaef. All of these "crimes" are directly attributable to the activities of the Government Agent, Jimmy Johnson (who never appeared to controvert Schaef's testimony, although he was available to so do).

When the facts are fully aired, a full review of the evidence cannot fail to convince an impartial observer that the defendants were not awaiting a propitious opportunity to enter into a sale of cocaine; but rather would have continued to avoid such involvement were it nor for the impermissible overbearing and reprehensible actions and representations of the Government informant followed up by the BNDD Agent Sternaman.

Instruction §13.13 of Devitt & Blackmar on FEDERAL JURY PRACTICE & INSTRUCTIONS contains the appropriate charge to be provided the jury when even the slightest

evidence of entrapment has been adduced. United States v. Henry (2d Cir. 1969) 417 F.2d 267. The basic issue is whether the Government agent or informant induced the defendant to commit a crime that he wasn't already planning to commit. And the Government must prove this contention beyond all reasonable doubt. Notaro v. United States (9th Cir. 1966), 363 F.2d 169, 175-176. §1313. ibid.

The critical boner was the refusal to even allow argument or to instruct on entrapment after Petitioner Schaef had testified - without contest - that Federal Agent, Jimmy Johnson, lured him into the narcotics business and his relations with McCarthy and Fernimen were a direct result of such behavior. Cf. Sherman v. United States, supra, Petitioners have never even had their day in court on the entrapment issue. See Masciale v. United States, 356 U.S. 386, 78 S. Ct. 827 (1958).

III

THE NINTH CIRCUIT, IN AN AREA OF MUCH CONFUSION IN THE LAW ERRONEOUSLY DENIED PETITIONERS SCHAEF AND MCCARTHY THE RIGHT TO ASSERT THE DEFENSE OF ENTRAPMENT ON THE GROUND THAT THEY WERE FORECLOSED FROM ASSERTING THAT DEFENSE BECAUSE NEITHER TOTALLY CONFESSED TO CRIMINAL CONDUCT, ALTHOUGH ALMOST ALL OF THE GOVERNMENT'S EVIDENCE WAS CONCEDED AND THE CIRCUITS ARE IN CONFLICT AS TO THE VALIDITY OF BARRING AN ENTRAPMENT DEFENSE WHERE THERE IS NO OUTRIGHT CONCESSION OF CRIMINAL INVOLVEMENT.

The Ninth Circuit Court of Appeal citing its outdated and illogical rule that a defendant must admit the crime before he

relies on the defense of entrapment foreclosed Petitioners from even presenting their case to the jury via either instruction or argument. (C.A. Op. p. 2) Thus the Court avoided ruling on contentions I and II herein, namely,that there was entrapment as a matter of law or at least entrapment instructions should have been presented to the jury and counsel should have been permitted to argue the defense of entrapment. Petitioners effectively were prohibited from presenting any defense.

This Court has never ruled on the issue and the present case is ideal for presenting the farcical underpinnings of the Courts argument rejected in many well thought-out cases. See e.g. Sears v. United States (5th Cir. 1965, 343 F.2d 139, 142-144; Henderson v. United States (5th Cir. 1956, 237 F.2d 169, 173, 61 A.L.R. 2d 666; People v. Perez, 62 Cal. 2d 769, 44 Cal.

Rptr. 326, 329, 401 P.2d 934 (1965); People v. Marsden, 234 Cal. App. 2d 796, 800, 44 Cal. Rptr. 728 (1965). In the first place, Petitioner Schaef admitted 95% of the Government's case but explained that he was goaded into involvement in the cocaine transactions by Government informant-agent Jimmy Johnson who was receiving Government pay and never contradicted Schaef's account. Certainly, Schaef cannot be required to confess in legal conclusions acknowledging total consistency of recall with the prosecution's case in order to assert the defense of entrapment yet that is precisely what the Ninth Circuit has held. It would be difficult to find a case where the defendant's recollection was congruent in every detail with that of every Government witness. Even those witnesses are unlikely to survive a lawsuit without some difference in recall.

Schaef's whole defense was entrapment and the fact that he did not pronounce the talismanic words "I'm guilty" should not deprive him of his entrapment defense. The same may be said for Petitioner McCarthy. The following analysis from Sears, supra, should be decisive:

"Before considering the merits of appellant's contentions that the District Court erred in denying his motion for acquittal and in refusing to instruct the jury on entrapment, we must take up the preliminary question of whether entrapment is an unavailable defense to one who, as Sears does here, denies commission of the acts charged. In Marko v. United States, 5 Cir., 1963, 314 F.2d 595; and Rodriguez v. United States, 5 Cir., 1955, 227 F.2d 912, we indicated that normally the defense of entrapment is unavailable in such

circumstances. See also Eastman v. United States, 9 Cir., 1954, 212 F.2d 320. This rule seems to be an outgrowth of statements in such cases as Hamilton v. United States, 5 Cir., 195 221 F.2d 611, that the defense of entrapment "necessarily assumes that the act charged was committed." The basis for the rule is that it would be inconsistent and confusing to allow a defendant to contend in one breath that he did not commit the crime, and in the next breath that he was entrapped into committing it. Moreover, it will not generally be the case, becaus of practical reasons, for a defendant who denies commission of the crime to to present any evidence of entrapment Thus, where commission of the crime i denied, the evidentiary base for the defense of entrapment will usually be

lacking.

In Henderson v. United States, 5 Cir., 1956,237 F.2d 169, we held that the defense of entrapment was available where a defendant denied that he was a party to or knew of the conspiracy with which he was charged, but admitted commission of one of the alleged overt acts. The court stated that since the common goal of all trials is the ascertainment of truth, inconsistent defenses should be permitted or not permitted according to whether they might help or hinder the search for truth. The court went on to hold:

"So here, it seems to us that the defendant could admit operating the illicit still, deny being a party to the conspiracy charged, and still defend on the ground that such overt acts as he did commit were done

as a result of entrapment; he could say, 'I did not go so far as to become a party to the conspiracy, but to the extent that I did travel down the road to crime, I was entrapped.' The two defenses do not seem to us so repugnant that proof of the one necessarily disproves the other. Whether a greater degree of inconsistency in defenses should be permitted need not be decided in this case."

In the present case, substantial evidence of entrapment was introduced in the case by the testimony of the government's own witnesses. The defendant Sears did not take an inconsistent position in the sense of offering any evidence of entrapment which would necessarily contradict and disprove his primary defenses that he never committed any of the acts charged.

The question is whether under these circumstances, a defendant is precluded from invoking the defense of entrapment. The Marko and Rodriguez cases, supra, did not present this question, and are not controlling here.

We hold that where, as here, the government's own case in chief injected substantial evidence of entrapment into the case, the defendant is entitled to raise the defense by motion for acquittal and by requested instruction to the jury. We do not think it is impermissibly inconsistent for a defendant to deny the acts charged, yet urge the court on motion for acquittal that the government's own evidence establishes entrapment as a matter of law. Similarly, the defendant is entitled to have a charge adjusted to the evidence, and if the government

injects evidence of entrapment into the case, the defendant is entitled to have the jury instructed that if they find he committed the acts charged, they must further consider whether he was entrapped into committing them. We feel that the ultimate goal of the criminal trial, the ascertainment of truth, Henderson v. United States, supra, permits no other course. A criminal defendant should not forfeit what may be a valid defense, nor should the court ignore what may be improper conduct by law enforcement officers, merely because the defendant elected to put the government to its proof.

IV

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION AGAINST PETITIONER MCCARTHY.

The Federal Courts have viewed with disfavor, a finding of guilt of or complicity in narcotics violations where the evidence is tenuous and fragmentary. See United States v. Jones (2nd Cir. 1962), 308 F.2d 26, Arellanes v. United States (9th Cir. 1962), 302 F.2d 603, Hernandez v. United States (9th Cir. 1962), 300 F.2d 114, United States v. Mills (3rd Cir. 1961) 293 F.2d 609; Adams v. United States (5th Cir. 1955), 220 F.2d 297; United States v. Contrades, 196 F. Supp. 803 (1961); United States v. Santore (2nd Cir. 1960) 290 F.2d 51.

Speaking of "possession" of narcotic drugs, the Court in United States v. Warren

(7th Cir. 1948), 170 F.2d 603, 606 ennunciated:

> "To 'possess' means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature."

Possession must be in the defendant not in someone else with the defendant's knowledge or even with his permission. United States v. Landry (7th Cir. 1958), 257 F.2d 425; Morei v. United States (6th Cir. 1942), 127 F.2d 827. Moreover, the defendant may even own the goods so long as he does not presently possess them. United States v. Landry, supra. Although the defendant demonstrates a willingness to participate in the narcotics trade, even to the point of telling a party where he may find narcotics located, this is not present possession. United States v. Jones, supra; Williams v. United States (9th Cir.

1961), 290 F.2d 451; Morei v. United States, supra.

In United States v. Jones, supra, the defendant, as in this case, was found guilty of violating section 174 of Title 21 of the United States Code (The Narcotics Drug import and Export Act). The facts revealed that the defendant advised a Government agent that he would obtain narcotics for the agent through his "connection". The defendant conversed with the "connection", introduced the two and the "connection" delivered narcotics to the buyer upon payment of $150. The Court, although recognizing the doctrines of "constructive possession" and "aiding and abetting", held that the proof of possession was insufficient inasmuch as the defendant merely arranged the sale of heroin. The Court stated:

"As far as the record discloses, defendant did nothing except to introduce

a willing buyer to a willing seller and to serve as a go-between until such time as the willing seller and willing buyer were satisfied to do business with each other." At Page 31.

In Williams v. United States, supra, the defendant's conviction was reversed for insufficient proof of possession even though the buyer was told the defendant would leave narcotics in a refuse can next to the cafe where the defendant worked, and when the defendant accompanied the buyer to the trash can the narcotics were located therein. In Morei v. United States, supra, the defendant was approached by the Government informant to buy narcotics and directed him to another person where the sale was consummated. The case was reversed for failure to prove possession.

The evidence in the present case merely shows that Petitioner McCarthy a police informant, was able to direct a willing narcotics buyer - seller to someone willing to listen to his entreaties. McCarthy had no "stake in the venture" and is not guilty of the charges.

V

THE METHOD BY WHICH BOTH THE GRAND AND PETIT JURORS ARE SELECTED IS CONSTITUTIONALLY DEFECTIVE IN THAT IT DENIES PETITIONERS EQUAL PROTECTION OF THE LAWS. THUS, THE GRAND JURY INDICTMENT SHOULD BE QUASHED AND THE CASE DISMISSED.*

A/ The Grand and Petit venire systematically, comprehensively and categorically discriminates against those persons of the ages eighteen to twenty-one who have manifested their civil maturity by becoming registered voters and qualifying to sit as jurors.

On June 22nd of 1970, the Congress

* This argument was presented prior to trial in the Federal District Court. The Trial Judge overruled the motions.

of the United States amended the Voting Rights Act (Pub.L.91-285, 84 Stat. 314), guaranteeing to all persons who reached their eighteenth birthday the unhindered use of the elective franchise in Federal elections. On December 21, 1970, the United States Supreme Court upheld the validity of the legislation. United States v. Arizona, 91 S.Ct. 260 (1970).[1/] Since then, eighteen, nineteen and twenty-year-old voters registered to vote for the first time. Although many of our younger citizens are now registered voters and their names appear on the sole source of both the Federal Grand and Petit Venire, they are ritualistically lopped off the list of the otherwise qualified merely because of their age. (See Affidavit of Luke McKissack, Esquire - Appendix "C". The vehicle

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1/ It invalidated that portion of the Act which purported to enfranchise eighteen year olds in State and local elections.

utilized to proscribe their civic participation as jurors is found in 28 U.S.C., Section 1865 (b)(1). That section allows but does not compel the exclusion of this group from the jury lists. For while the previous statute dealing with the qualification of jurors made the elimination of persons under the age of twenty-one mandatory, the new provisions (March 27, 1968, Pub.L. 90-274, §101, 82 Stat. 54-58) merely qualifies all persons above the age of twenty-one who are not otherwise fit. In fact, the old section which necessitated the discrimination against persons under twenty-one was repealed and in its stead appeared a more liberal provision entitled Declaration of Policy. It states:

> "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit

juries selected at random from a fair cross section of the community in the district or divisionwherein the court convenes. It is further the policy of the United States and all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose. As amended March 27, 1968, Pub.L. 90-274, §101, 82 Stat. 54." 2/

It is fully necessary that this new section and those following it be read in conjunction with Section 1865, in order to ascertain

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2/ Our Courts have emphasized that the question of competent jurors is subsidiary to the basic precept that a defendant is entitled to have his judges chosen from a fair cross section of the electorate. Mobley v. United States, (5th Cir. 1967), 379 F.2d 768.

whether persons under twenty-one are automatically ineligible to perform jury servic Nowhere does the United States Code prescribe that persons who are otherwise equipped to serve as jurors must be turned away because of an age deficiency. In fact, this District, in adopting a plan which seeks to find a cross section of jurors by resort to the voting rolls, has implemented a policy which calls for the inclusion of eighteen year olds. Thus, th issue seeking resolution here is whether the Court and the relevant Court attaches may employ the list of registered voters and yet strip from the candidates for jury duty those who have not reached their twen first birthday.

The defense maintains that the same policy questions that both Congress and th Supreme Court found persuasive militate against such an arbitrary, capricious and

invidious discrimination against an otherwise qualified group of citizens.

An analysis of the Equal Protection Clause, with special emphasis on such recent developments as United States v. Arizona, supra, is compelled. In that case, four members of the Court regarded the Equal Protection Clause of the Constitution as controlling. Mr. Justice Douglas, in his concurring opinion, traced the history of the clause which matured from its embryonic narrow application to discrimination against blacks alone to a more primal guarantee against irrational discriminations of any sort. The reapportionment cases protected urban citizens against having their votes diminished to often ten times less worth than rural citizens. See Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691(1962); Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801 (1963); Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441

(1964); Swann v. Adams, 385 U.S. 441, 87 S. Ct.569 (1967); Kilgarin v. Hill, 386 U.S. 120, 87 S. Ct. 820 (1967). And, although the history of that growth was originally handicapped by a reluctance of the judiciary to involve itself in"Political questions", and to defer to Congressional and legislative judgments (Colgrove v. Green, 328 U.S. 549 (1948; McDougall v. Green, 335 U.S. 28 (1948); South v. Peters, 339 U.S. 279 (1949)), such abstention is now history. The Equal Protection and the Due Process Clauses, like the Cruel and Unusual Punishment Provision, have followed the "evolving standards of decency that mark the progress of a maturing society" Trop v. Dulles (Chief Justice Warren Plurality Opinion), 356 U.S. 86 at 101, 78 S. Ct. 590 at 598, (1958). Mr. Justice Douglas capsulized several recent cases whic corroborate this growth. In Carrington v.

Rash, 380 U.S. 89, 85 S. Ct. 775 (1965), the Court treated the actions of the Texas Legislature in barring servicemen, otherwise qualified, from voting, as violative of the Equal Protection Clause. In Evans v. Cornman, 398 U.S. 419, 90 S. Ct. 1752 (1970), the Court turned thumbs down on an attempt by the State of Mayyland to prevent residents of a Federal enclave from voting. Both of these cases lead ineluctably to the conclusion that the Government must be able to justify disallowing the vote to persons who are residentially and otherwise qualified, based on some rationale which will pass Constitutional muster. Despite the unpredictability of servicemen's tenure in a locale, since they are normally transient due to the nature of their occupation and alwasy subject to an order to leave, and thus, perhaps more inclined to "take over" the town nearby the base rather than settle there,

this was discounted as a sufficient factor to enable a statute which differentiated them from other resident citizens to be declared valid. And, despite differences in status which were regarded as permissible between the persons living on the Federal enclave surrounded by the State of Maryland, a right as precious and an obligation so sacred as the right to vote was regarded as inalienable.

In Kramer v. Union Free School District, 395 U.S. 621, 89 S. Ct. 1886 (1969), the Court held that a bachelor could not be forbidden to vote in school board elections. Although the State advanced the obvious argument that those persons having children attending school could be legitimately differentiated as having more of an interest in the treatment of their offspring than someone who had none, much less any of school age, failed to prevail. Can it be said that the Govern-

mental interest in permitting the exclusion of eighteen, nineteen and twenty year old citizen voters is justified, when one considers that Congress itself has recognized the fact that having such a responsibility in our society, they must be able to play some role in it. In fact, the Act itself brands the past failure to extend the vote to eighteen year olds as

> "a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed."

on them. Section 301(a)(1), Voting Rights Act of 1970, 84 Stat. 314, 42 U.S.C., Section 1973bb.

In Cipriano v. City of Houma, 395 U.S. 701, 89 S. Ct. 1897 (1969), the Court held that the Equal Protection Clause was violated by a State law which granted only "property taxpayers" the right to vote on the issuance of revenue bonds of a municipal

utility system because "the benefits and burdens of the bond issue fall indiscriminately on property owner and non-property owner alike". 395 U.S. at 705, 89 S. Ct. at 1900.

In Phoenix v. Kolodziejski, 399 U.S. 204, 90 S. Ct. 1990 (1970), the Court found no compelling state interest which justified the law limiting the right to vote on general obligation bonds to real property taxpayers. Accord: Parish School Board of St. Charles v. Stewart, 400 U.S. 884, 91 S. Ct. 136 (1970).

Speaking for himself, Mr. Justice White and Mr. Justice Marshall, Mr. Justice Brennan, in United States v. Arizona, supra, concurred, noting:

> "We believe there is serious question whether a statute granting the franchise to citizens over 21 while denying it to those between the ages of 18 and 21 could,

in any event, withstand present scrutiny under the Equal Protection Clause." 91 S. Ct. at 323.

Inasmuch as Congress had expressly spoken in favor of extending the franchise to eighteen year olds and the issue of eighteen year old jurors was not before the Court, there was no necessity to belabor the question. It is clear, however, that Congress must assert a compelling justification for the discrimination involved here.[3/]

The Supreme Court in all of these cases went to great lengths to regard as too minimal the governmental justification

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3/ Acts of Congress are scrutinized like acts of State legislatures, only more so, because of Federalism in the latter situation. See United States v. Butera, supra, p. 568 fn. 7; Rabinowitz v. United States, (5th Cir. 1966) 366 F.2d 34.

for different treatment for persons who otherwise qualify to vote. In fact, Congress expressly found that the stake that persons eighteen years of age have in this country (undoubtedly thinking largely of military obligations) compelled their assuming the responsibility and the right of participation in the decision-making process. No less a stake does the eighteen to twenty-one year old have in the administration of justice, both in the criminal and the civil courts. He certainly is as affected by the functioning of law as was the bachelor in Kramer by decisions made by the school board. Similarly, in areas of the law where young people have special problems and different opinions, such as military service and drugs and victimless crimes, they should be able to at least have eligible as jurors those in their peer group who share these opinions and who are entitled

to express themselves as "the conscience of the community". This is the basic function of the jury pounded out on the anvi anvil of experience for over a thousand years.

Mr. Justice Strong declared in Strauder v. West Virginia, 100 U.S. 303 (1880):

> "The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in

his commentaries, says, 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.'" At pages 308-309.

Thomas Jefferson declared in his first inaugural address (March 4, 1801),

"Freedom of religion, freedom of the press, freedom of person under the protection of the habeas corpus; and trial by jury impartially selected, - these principles form the bright constellation which has gone before us." Rabinowitz v. United States, 366 F.2d at 45.

Thus, the Equal Protection Clause and the Due Process Clause, which are often intertwined in application and analysis, Chambers v. Florida, 309 U.S. 227, 241, 60 S. Ct. 472 (1940); In re Anderson, 69 Cal.

2d 613, 638, 73 Cal. Rptr. 21, 47 (1968) (Justice Tobriner, concurring and dissenting), furnish a bulwark against "invidious discrimination" (cf. McLaughlin v. Florida, 379 U.S. 184, 190, 194, 85 S. Ct. 283 (1964); Douglas v. California, 372 U.S. 353, 356, 83 S. Ct. 814(1963; Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110 (1942)), guaranteeing impartial even-handed treatment of all persons under our law.

Initially, it should be noted that it is not necessary that the defendant be a member of the excluded class in order to raise the question of jury discrimination. Ballard v. United States, 329 U.S. 187,195, 67 S. Ct. 261, 265 (1946) (Exclusion of women); United States v. Butera, (1st Cir. 1960), 420 F.2d 564, 567, fn. 2 (discrimination against youth and women); Crawford v. Bounds, (4th Cir. 1968), 395 F.2d 297 (Challenge to exclusion of day laborers

although defendant was not one); Rabinowitz v. United States, (5th Cir. 1966), 366 F. 2d 34 (white SNCC organizer complaining of discrimination against blacks in jury selection); Labat v. Bennett, 365 F.2d 698, cert. den., 386 U.S. 991 (challenge to death oriented jurors by defendant); State v. Madison, 240 Md. 265, 270, 213 A.2d 880, 885 (1965 (theist could challenge ineligibility of atheists); Walter v. State, 208 Ind. 231, 195 N.E. 268, 98 A.L.R. 607 (1935) (male defendant challenged exclusion of women from jury); Allen v. State, 110 Ga. App.56, 137 S.E. 2d 711 (1964) (white civil rights worker claimed blacks excluded); Accord: State v. Lowry, 263 N.C. 536, 139 S.E. 2d 870 (1965).

Our Courts have upheld the use of the voter registration list as a sole source of names for jury duty [4] if, and only

[4] There is no distinction in the Constitution or in the cases arising under it between the Grand Jury venire and the

if, there is no systematic exclusion of a cognizable group or class of qualified citizens. United States v. Dangler (5th Cir. 1970), 422 F.2d 344; Camp v. United States, (5th Cir. 1969), 413 F.2d 419, cert. den., 90 S. Ct. 451, 396 U.S. 968; Rabinowitz v. United States (5th Cir. 1966) 366 F.2d 34; there must be a fair cross section of the community. Rabinowitz, supra; Abbott v. Mines (6th Cir. 1969), 411 F.2d 353; Mobley v. United States (5th Cir. 1967), 379 F.2d 708. It has even been held that young adults are a cognizable group. United States v. Butera, supra. 5/

Petit Jury list in terms of the guarantee that each represent a cross section of the community and each is subject to the watchful eye of the Equal Protection Clause. Cf. Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1880); Pierre v. Louisiana, 306 U.S. 354, 59 S. Ct. 536 (1939).

5/ They have even developed their own ideals and their own culture. Reich, The Greening of America (1970).

And yet, for no decipherable reason, a Congressional statute (28 U.S.C. 1856 (b) (1)) [6/] has been interpreted so as to systematically exclude all eighteen, nineteen and twenty year old registered voters.

The only decision counsel has found which treats the issue before this Court, United States v. Gargan (D.C. Wis. 1970), 314 F. Supp. 414, offered the facile distinction that Congress apparently regarded eighteen year olds of sufficient maturity to vote but not to act as jurors. But that answer is unsupportable either in logic or the history of the new voting legislation.

Manifestly, there is no "rational connection" between the fact that eighteen

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6/ Nothing appears in the legislative history of the Amendment lowering the voting age to 18 to substantiate a desire by Congress to retain the 21 year old standard with respect to jurors. In all probability, the age-old argument "old enough to fight, old enough to vote" was so transcendent that similar anachronisms passed by unnoticed.

year olds regarded as capable of voting are incompetent to serve as jurors. Cf. Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241 (1943); Leary v. United States, 395 U.S. 6, 89 S. Ct. 1352 (1969); United States v. Gainey, 380 U.S.63, 85 S. Ct. 754 (1965); United States v. Romano, 382 U.S. 136, 86 S. Ct. 279 (1965).

I believe that it was Mr. Justice Frankfurter who once opined that you could judge a civilization by the way it administered its criminal laws. And it is suggested that to leave eighteen, nineteen and twenty year olds off of juries despite the fact that society regards them as mature enough to vote, contract, marry, go to war, be held responsible for crimes [7], terminate

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7/ It is apparent that an argument which suggests that eighteen year old persons are mature enough to participate in the electoral process but not mature enough or competent to serve on juries strains credulity. Forty nien states treat this group the same under the criminal law as persons over twenty-one. And even

their schooling if they choose, etc. is to offer the people of America and especially its, youth, a "distinction without a difference" which the "omnipresent teacher" can ill afford to do in an age of

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California does as a practical matter, since juvenile courts rarely exercise jurisdiction over persons who have passed their eighteenth birthday, although their jurisdiction is concurrent. All states permit eighteen year olds to marry, and 39 states do not require parental consent for marriage. (See concurring opinion of Mr. Justice Brennan in United States v. Arizona, 91 S. Ct. at 324). Mr. Justice Brennan elucidated how fortuitous was the selection of age twenty-one as the maturation point, explaining that it was a mere outgrowth of medieval needs to make time available for training and to develop the physique to carry armor. Times have changed and so has the education and maturation rate. In 1900, six per cent of eighteen year olds had completed high school; today the figure is 81%. Eighteen year olds compose a substantial portion of the work force. Dr. Margaret Mead testified that "the age of physical maturity has been dropping and has dropped over three years". (ibid.)

more rapid maturity and an ever-increasing generation gap and the unanswerable cry that that the youth are eliminated from the decision-making process. The day when the eighteen year old is satisfied with being an explorer scout emeritus or a journeyman citizen are over. The recognition by the Congress that young people have a right to control their destiny by participation in the democratic process is admirable. It is also indisputable that the tensions in the judicial system can ill afford to illogically bar its inchoate young adult population from the jury box and expect that it will repeat the litany that persons are receiving a fair trial by a jury of their peers.

Thus, the Petitioners move this Court to declare invalid his commitment by a Grand Jury deliberately constituted so as to exclude jurors from ages eighteen to twenty-one; and as a consequence to dismiss the case.

CONCLUSION

The Petition for Writ of Certiorari, Petitioners respectfully pray, should be granted and the judgments reversed.

LUKE McKISSACK
Attorney for Petitioners

APPENDIX

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ERNEST A. SCHAEF, JOHN KEMP MCCARTHY, HARDY LEE FERNIMEN, *Defendants-Appellants.*	Nos. 72-2517, 72-2470, and 72-2615 MEMORANDUM

[November 27, 1973]

Before: MERRILL and WALLACE, Circuit Judges, and PECKHAM,* District Judge

PER CURIAM:

Appellants were found guilty by a jury verdict on all applicable counts of an indictment involving various charges of conspiracy to distribute, possession with intent to distribute, and distribution of a controlled substance (21 U.S.C. §§ 846, 841(a)(1)). The charges against Schaef and McCarthy arose out of a series of transactions with a government agent, Sternaman, who was initially introduced to them by an informant, Johnson. The charges against Fernimen arose primarily out of the fruits of a search of his residence after the last and largest transaction between Schaef and Sternaman, although he was also implicated in several of the previous transactions.

Appellants have presented five separate grounds for reversal of their convictions. For the reasons set forth below, we conclude that these contentions have no merit and that the convictions must be affirmed.

*Honorable Robert F. Peckham, United States District Judge, Northern District of California, sitting by designation.

APPENDIX "A"

First, appellants argue that they were entrapped as a matter of law, or alternatively, that they were entitled to present the defense of entrapment to the jury with appropriate instructions. The record indicates that neither McCarthy nor Fernimen offered or sought any instructions on entrapment, and neither one introduced any evidence to establish a defense of entrapment. Indeed, appellants' brief on appeal is directed entirely to the issue of Schaef's entrapment by informant Johnson and agent Sternaman; there is no attempt to show that McCarthy and Fernimen were even indirectly induced to commit the crimes at issue through the creative activity of a government agent. *Cf. Carbajal-Portillo v. United States*, 396 F.2d 944 (9th Cir. 1968).

Appellant Schaef is entitled to raise the entrapment defense, if at all, only as to Counts Two, Three and Four, involving the earliest sales. As to the possession charge and the final sale, Counts Five and Six, there is no evidence to suggest that any affirmative activity of the government agents induced the criminal actions; and as to the conspiracy charge, Count One, Schaef denied the existence of the conspiracy and therefore is not entitled to assert the entrapment defense. *United States v. Azadian*, 436 F.2d 81, 83 (9th Cir. 1971); *Ortega v. United States*, 348 F.2d 874, 876 (9th Cir. 1965). Under the concurrent sentence doctrine, we decline to reach the issue of whether the failure to instruct as to the entrapment defense on Counts Two through Four was reversible error, since the five-year sentences for those counts are to run concurrently with the fifteen-year sentence on Count One, and there has been no showing of any adverse collateral consequences arising from the additional convictions on Counts Two through Four. *United States v. Moore*, 452 F.2d 576, 577 (9th Cir. 1971).

Second, appellant Fernimen argues that the federal officers who entered his home and seized substantial quantities of cocaine failed to comply with the requirements of 18 U.S.C. § 3109, and that the fruits of that seizure accordingly should have been suppressed. We note, as appellee has pointed out, that the record before us is incomplete in that it does not contain a transcript of the suppression hearing conducted prior to trial. Nevertheless, it does appear from the record before us that the agents knocked, announced their presence and purpose, and waited for a period of time sufficient to support the inference that they were being refused admittance.

This procedure precisely meets the requirements of § 3109; thus thre is no ground for reversal.

Third, Fernimen also argues that reversal is required for the trial court's failure to permit him to confer with his counsel and to conduct a hearing on the voluntariness of certain false exculpatory statements which the government sought to introduce. *Harris v. New York*, 401 U.S. 222 (1971), squarely holds that prior inconsistent statements may be used to impeach a defendant who takes the stand even if such statements would have been inadmissible as direct evidence because of failure to give a Miranda warning before the statements were taken. There is no indication that Fernimen and his counsel were surprised by the statements or could not have discussed them in advance of his taking the stand; moreover, on redirect examination counsel had a full opportunity to elicit the circumstances under which the statements were made, so that the jury could give them the appropriate weight for impeachment purposes. Counsel contends that a hearing should have been held on the issue of voluntariness, but Fernimen's own testimony belies any contention that the statements were coerced or otherwise involuntary. Finally, the trial court fully instructed the jury that the statements should be considered solely for impeachment purposes and not as proof of the matters they asserted. We find no constitutional infirmity here.

Fourth, all appellants contend that the grand and petit juries which indicted and convicted them were unconstitutionally constituted in that persons of ages eighteen to twenty-one were systematically excluded from participation. This contention has been presented to this Circuit on numerous occasions and has been firmly rejected. *United States v. Ross*, 468 F.2d 1213 (9th Cir. 1972); *United States v. Duncan*, 456 F.2d 1401 (9th Cir. 1972).

Finally, appellant McCarthy challenges the sufficiency of the evidence to sustain his conviction on charges of conspiracy and distribution. This contention finds no support in the record, which clearly contains sufficient evidence to permit a jury to reach a verdict of guilty on both counts.

Affirmed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 11-30-73—480

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 14 1974

CLERK
U. S. COURT OF APPEALS

ERNEST A. SCHAEF,
JOHM KEMP McCARTHY, and
HARDY LEE FERNIMEN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Nos. 72-2517, 72-2470,
72-2615

On Petition for Rehearing

Before: MERRILL and WALLACE, Circuit Judges,
and PECKHAM, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

APPENDIX "B"

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Attorney for Defendant

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. HARDY LEE FERNIMEN, Defendant.	NO. 8734-CD AFFIDAVIT OF LUKE McKISSACK, ESQUIRE, IN SUPPORT OF MOTIONS T QUASH THE GRAND JURY, DISMISS TH INDICTMENT, RECONSTITUTE, IF NECESSARY, THE PETIT VENIRE.

The affiant is the attorney for Defendant, HARDY LEE FERNIMEN, in the above action, is licensed to practice before this Court and in the State of California. Affiant has discussed with Attorney David M. Rothman General Order No. 55, the plan employed in this United States District Court for the Central District of Californi for the selection of grand and petit veniremen adopted pursuant to the requirements of 18 U.S.C. §1861 et seq. Mr. Rothman related to me his experiences in discussing this plan with Deputy Clerk, Robe Erickson, of this Court and furnished me with an affidavit concerning his study of the methodology employed in this district for the selection of grand and trial jurors. After some study of the plan and the statutory scheme from which it stems, I contacted Betty Modic, Section Head of the Jury Department, on Wednesday, January 5 1972. During my conversation with Ms. Modic, she described in detail the system used for selection of jurors. She explained that every two years, each county in the Central District, seven as I recall, turns over to her the name of one person for every 100

EXHIBIT "C"

registered voters as of that date. This group becomes the ve
from which jury panels are extracted, both for purposes of sa
ing grand jury requirements and affording trial jurors. The l
time that this process occurred was in December of 1969. Ms.
explained further that out of, say, every 3,000 prospective ju
as a result of answering a questionnaire, approximately 2,400
disqualified or excused. Of the remaining 600, summons are se
them and of that group, approximately 200 are incapable of bei
reached, due to a change of address, or some such circumstance.
A random selection is then made out of the final group for bot
grand and petit jury panels. By virtue of the provisions in 2
U.S.C. §1865(b)(1), NO person has ever been accepted for jury d
or even placed on the list of eligibles who was beneath the ag
twenty-one, although persons eighteen years and above have bee
permitted to register and have registered to vote since the beg
of 1971.

Defendant, HARDY LEE FERNIMEN, has hitherto been indicted b
March, 1971, Grand Jury, none of whose members were of the age
tween eighteen and twenty-one; nor could they have been, for th
reason that the list from which they were chosen systematically
categorically excluded all such persons. Likewise, the petit j
panel which is scheduled to hear his case consists only of pers
twenty-one years of age and above; again, for the reason that t
manifest of candidates deisgnedly included no one in that age g

The defendant is charged with various counts relating to th
manipulation of cocaine. Cocaine is classified under the narco
and drug laws, as a Schedule II drug. Although it is character
for Federal penal purposes as a narcotic, the use of cocaine ne
leads to tolerance, nor does the cessation of its use occasion
drawals. It is common knowledge that the attitude towards drug
this country has undergone radical change. Even the Federal st
tory scheme covering narcotics use/abuse reflects that conclusi

For example, prior to May 1, 1971, cocaine was treated along with heroin in a catch-all narcotic statute [21 U.S.C.§§173,174], and a conviction for manipulating cocaine formerly carried a penalty of five to twenty years in the penitentiary for a first offense, without eligibility for either probation or parole. As of now, the defendant could be granted probation or sentenced to a period of incarceration of from one to fifteen years. The stark, indiscriminate horror exhibited by the average adult, particularly those of advanced years, towards narcotics is indisputable. Equally beyond dispute is the altered attitude of youth, epitomized by the typical eighteen to twenty-one year old. Clearly, the defendant has a better chance of receiving a fair and impartial judgment, unsullied by the traditional attitudes of the ill-informed, if eighteen, nineteen and twenty year olds are allowed to serve on his jury. But that very maturity of judgment, which he so desparately needs will be absent from any jury which adjudicates his cause, due to the fact that that mature understanding has been dispensed with implicitly in the name of chronological age.

DATED:
JANUARY 10, 1972

Luke McKissack
LUKE McKISSACK

Subscribed and sworn to
before me on this
10th day of January, 1972.

Marilyn Lee
Notary Public in and for the
County of Los Angeles, State of California

OFFICIAL SEAL
MARILYN LEE
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires Oct. 9, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1515

ERNEST A. SCHAEF AND JOHN KEMP MCCARTHY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that they were entrapped as a matter of law, (2) that they should have been permitted to present the defense of entrapment to the jury with appropriate instructions, and (3) that persons between the ages of 18 and 20 were improperly excluded from the grand and petit juries. Petitioner McCarthy also contends that the evidence was insufficient to support his conviction.

After a jury trial in the United States District Court for the Central District of California, petitioners were convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. Petitioner Schaef was also convicted on one count of possessing cocaine with intent to distribute and on four counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner

McCarthy was also convicted of distributing cocaine, in violation of 21 U.S.C. 841(a)(1).[1] Petitioner McCarthy was sentenced to a 10-year prison term, and petitioner Schaef was sentenced to a 20-year prison term. The court of appeals affirmed on November 27, 1973 (Pet. App. A). A petition for rehearing was denied on January 14, 1974 (Pet. App. B). The petition for a writ of certiorari was not filed until April 10, 1974, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

On July 10, 1971, Agent Sternaman of the Bureau of Narcotics and Dangerous Drugs met with petitioner McCarthy at the Hollywood-La Brea Motel in Hollywood, California, to negotiate the purchase of cocaine. Sternaman was accompanied by Jimmy Johnson, a government informant who had arranged the meeting. Sternaman and McCarthy made a deal for two ounces of cocaine at $700 an ounce and another ounce of cocaine for $400. McCarthy then said he would call petitioner Schaef and place the order (Tr. 84-85). After speaking with Schaef, McCarthy told Sternaman that he was to meet Schaef at the Chalet Gourmet, a restaurant in the area (Tr. 86). McCarthy told Sternaman he could be reached at the Hollywood-La Brea Motel for future purchases of narcotics.

Sternaman and Johnson then met Schaef in front of the Chalet Gourmet. Schaef instructed them to drive back to the motel (Tr. 87). In the car they discussed the price and amounts of future purchases of cocaine. When they arrived back at the motel, they found that McCarthy had

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[1]Co-defendant Fernimen was convicted of conspiring to distribute cocaine, distributing cocaine, and possessing cocaine with intent to distribute.

left and that they could not test the cocaine at his motel room. After driving around for a few minutes, Schaef handed Sternaman three packages of cocaine, for which Sternaman paid him $1,800.

On July 20, 1971, Sternaman and Schaef negotiated a deal for eight ounces of cocaine at $650 an ounce. On July 21, Schaef sold Sternaman 10 ounces of cocaine for $6,500 (Tr. 96-97, 107). Schaef told Sternaman that he could also supply him with China white heroin. After receiving the money, Schaef remarked that he was going to pay his man. Schaef then left and, after stopping briefly at an apartment, drove to co-defendant Fernimen's residence (Tr. 107, 279).

Schaef called Sternaman on July 26, 1971, and told him that the price for future purchases of heroin would be $600 an ounce. On July 27, Schaef called Sternaman and told him that he had been unable to obtain any heroin but that he could provide him with all the cocaine he needed (Tr. 100-101).

Sternaman and Schaef thereafter met several times to discuss future purchases of cocaine (Tr. 204, 207, 106-107, 110-111). At one of these meetings, Schaef gave Sternaman a small sample of cocaine (Tr. 109). Schaef also told Sternaman that he had been involved in narcotics dealings for the past two and one-half years (Tr. 207).

On August 6, 1971, Schaef called Sternaman and told him that he had 42 ounces of cocaine to sell. They met later that afternoon and Schaef gave Sternaman a one-ounce sample (Tr. 112-113). After a number of calls between the two over a three-day period, during which Schaef was staying at co-defendant Fernimen's residence, Schaef indicated he had accumulated 41 ounces of

cocaine to sell. He made arrangements to meet Sternaman at a restaurant on August 9, 1971. On that date, Schaef left Fernimen's residence carrying a yellow suitcase, which he placed in his car. He then drove to the restaurant (Tr. 322). In the parking lot of the restaurant, Schaef sold Sternaman 35 ounces of cocaine for $17,500. The cocaine had been in the yellow suitcase. After he gave Sternaman the cocaine, Schaef was arrested (Tr. 209, 213).

A search of co-defendant Fernimen's residence was then made pursuant to a warrant. The officers found a scale used in weighing and packaging narcotics, a stimulant prescription drug used to cut cocaine, 12 ounces of cocaine in the freezer, and some money used by Agent Sternaman to make an earlier narcotics purchase (Tr. 216, 218, 223, 356).

1. Petitioners' contention that they were entrapped is not supported by the record. The evidence warranted neither a finding of entrapment as a matter of law nor an instruction on entrapment by the trial court.

As this Court recently held in *United States* v. *Russell,* 411 U.S. 423, entrapment focuses on the predisposition of the defendant to commit the criminal act. Here, petitioner Schaef presented no evidence that he did not have a willing predisposition to sell narcotics.[2] In the two smaller sales of cocaine to Agent Sternaman on July 10 and 21, the evidence showed that the informant Johnson only provided the opportunity for petitioner Schaef to make the sale. That does not constitute entrapment. In the last sale, which was

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[2]Schaef testified that, because of his wife's medical problems, he needed money and could not turn down the opportunity to sell cocaine that informant Johnson offered him (Tr. 1050-1054).

consummated on August 9, 1971, the informant Johnson was no longer involved and the sale was arranged completely by Schaef. McCarthy submitted no evidence at all to establish a defense of entrapment. In these circumstances, no instruction on entrapment was required. See *United States* v. *Sanchez*, 440 F. 2d 649, 650 (C.A. 9); *United States* v. *Nieves*, 451 F. 2d 836, 837-838 (C.A. 2); *United States* v. *Aloisio*, 440 F. 2d 705, 711 (C.A. 7), certiorari denied, 404 U. S. 824; *United States* v. *Sullivan*, 443 F. 2d 813, 816 (C.A. 5), certiorari denied, 404 U.S. 861.[3]

2. Petitioner McCarthy contends (Pet. 69-73) that the evidence was insufficient to support his convictions, because it did not show that he possessed the narcotics. But McCarthy was not charged with possessing narcotics. He was charged and convicted of distributing the drugs and of conspiring to distribute them, charges which were amply supported by the evidence showing that he had arranged for the original sale of cocaine by petitioner Schaef to Agent Sternaman. The cases cited by McCarthy, relating to the proof required when

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[3]There is thus no need to consider whether, as petitioners argue, they should be permitted to claim that they were entrapped into committing the acts alleged in the indictment and simultaneously to deny that they committed those acts. We note, however, that the general view is contrary to petitioners' contention. See, *e.g.*, *United States* v. *Hendricks*, 456 F. 2d 167, 169 (C.A. 9); *United States* v. *Rodriques*, 433 F. 2d 760, 761 (C.A. 1), certiorari denied, 401 U.S. 943; *United States* v. *Kilpatrick*, 477 F. 2d 357, 359 (C.A. 6); *United States* v. *Gibson*, 446 F. 2d 719, 722 (C.A. 10). But see *Handford* v. *United States*, 303 F. 2d 219 (C.A.D.C.); *United States* v. *Groessel*, 440 F. 2d 602, 605 (C.A. 5), certiorari denied, 403 U.S. 933.

possession is an essential element of the offense are thus inapposite.[4]

3. Petitioners argue (Pet. 74-95) that the improper exclusion of persons between the ages of 18 and 20 years from the grand and petit juries deprived petitioners of equal protection of the laws. At the time of the indictment and trial, 28 U.S.C. 1865(b)(1) included as a qualification for federal jury service that the juror be at least 21 years old.[5] The constitutionality of that age requirement has been consistently upheld. See *United States* v. *Tantash*, 409 F. 2d 227, 228 (C.A. 9), certiorari denied, 395 U.S. 968; *United States* v. *Gast*, 457 F. 2d 141, 143 (C.A. 7), certiorari denied, 406 U.S. 969. Persons 18 through 20 are not an identifiable racial, ethnic, or similar group, whose exclusion renders a jury nonrepresentative of the community. *United States* v. *Olson*, 473 F. 2d 686, 688 (C.A. 8), certiorari denied, 412 U.S. 905. It is neither arbitrary nor unreasonable

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[4]Distribution of narcotics does not require possession. As the district court correctly instructed the jury, "[t]he term 'distribute' * * * means actually *or constructively* to transfer a quantity of cocaine" (Tr. 1494; emphasis added). Moreover, there was ample evidence to support a finding by the jury, consistent with the district court's instructions (Tr. 1462-1463), that McCarthy aided and abetted the distribution of the cocaine. He could therefore be found guilty as a principal even if he did not personally transfer the cocaine (18 U.S.C. 2).

[5]The statute was amended in 1972 to lower the age qualification to 18 years (P.L. 92-269, 86 Stat. 117).

for Congress to set the age qualification for jury service at 21. Nor does it matter that 18 year olds are entitled to vote in federal elections. "[T]here is no support in law or logic for the proposition that the right of jury service is a concomitant subsidiary of the franchise." *United States* v. *Olson, supra,* 473 F. 2d at 687, 688. See also *United States* v. *Duncan,* 456 F. 2d 1401, 1404-1405 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.